

**2018**

**LEGISLATIVE ASSEMBLY FOR THE  
AUSTRALIAN CAPITAL TERRITORY**

**CRIMES (CONSENT) AMENDMENT BILL 2018**

**EXPLANATORY STATEMENT**

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# CRIMES (CONSENT) AMENDMENT BILL 2018

## OUTLINE

This explanatory statement relates to the Crimes (Consent) Amendment Bill 2018 (“the Bill”). It has been prepared in order to assist the reader of the Bill and to help inform debate on it. It does not form part of the Bill and has not been endorsed by the Assembly. The statement is to be read in conjunction with the Bill. It is not, and is not meant to be, a comprehensive description of the Bill.

### Purpose of the Bill

The Crimes (Consent) Amendment Bill 2017 provides amendments to reform the *Crimes Act 1900* in relation to consent in sexual offences, intimate image abuse offences, and child sex offences.

The Bill will amend criminal laws to make key improvements to the criminal justice system to clarify the law of consent and provide better outcomes for victims and the community. These changes will define consent in the *Crimes Act 1900* (giving effect to an outstanding recommendation from the Australian Law Reform Commission’s 2010 Report, “*Family Violence - A National Legal Response*”), and incorporate a further *affirmative* definition of consent - more in line with modern community standards and reflective of innovations in the law.

The Bill will also correct a discrepancy between sections 68 and 72D(2) and sections 64 to 66 of the *Crimes Act 1900*. This discrepancy means that, while young people under 16 undertaking consensual sexual activity are protected from prosecution for some offences (by operation of sections 68 and 72D(2)), these same young people remain vulnerable to prosecution for the same or similar activities elsewhere in the Act.

In summary, the Bill will:

1. clarify child pornography offences to ensure that images consensually shared by young people will not result in their prosecution, similar to the 2-year rule for sexual offences;
2. give effect to recommendation 25-4 of the Australian Law Reform Commission’s 2010 Report, “*Family Violence - A National Legal Response*”;

The recommendation reads:

***Recommendation 25–4*** *Federal, state and territory sexual offence provisions should include a statutory definition of consent based on the concept of free and voluntary agreement.*

3. clarify and expand the definition of consent for both intimate image abuse and sexual offences by creating an *affirmative* definition of consent, modelled upon the “reasonable belief” construction of section 273.2 of the *Criminal Code* (Canada) R.S.C., 1985, c. C-46; and
4. implement further technical and procedural amendments to ensure an efficient and clear criminal law.

## **Background**

In 1999, the ACT agreed to adopt the Model Criminal Code which was, at the time, being rolled out nationally as part of law harmonisation efforts. While the ACT did not fully implement the Code and the national harmonisation project did not eventuate, the draft Code incorporated two relevant recommendations:

1. to create “similarity of age” defences or exclusions to prevent young people engaging in consensual sexual activities from undue prosecution; and,
2. to create a clear definition of consent for inclusion in the relevant criminal legislation.

The first recommendation was partly implemented by the ACT Government (at section 68 of the *Crimes Act 1900*), but has not subsequently been expanded to cover other sexual or peripheral offences created since then, including child pornography offences.

The second recommendation was not adopted by the ACT Government.

In 2008, the Federal Government commissioned the National Council to Reduce Violence Against Women and their Children to draft a national plan to reduce violence against women. This plan of action was released as the 2009 report “Time for Action” which included a number of legal reform pathways, and highlighted serious concern over the lack of uniformity or progress across Australian jurisdictions in relation to consent in sexual offences.

The Australian Law Reform Commission (ALRC) reviewed the 2009 report and reported back on the status of the law in each state and territory and at a federal level, and on what reforms should be undertaken to implement the action plan. In 2010, ALRC returned their final report into family violence. In chapter 25, the ALRC report explored consent reform in detail, and made recommendations to harmonise laws in each jurisdiction.

The ACT has thus far failed to fully implement the recommendations in chapter 25. This Bill gives effect to recommendation 25-4 of the ALRC report, and to the “similarity of age” recommendation outstanding from the 1999 Model Criminal Code implementation.

This Bill reflects a number of changes proposed in Caroline Le Couteur’s Crimes (Invasions of Privacy) Amendment Bill 2017, and resolves several of the reforms left outstanding from that Bill following the passage of the Crimes (Intimate Image Abuse) Amendment Bill 2017.

## **Human Rights Considerations**

We recognise this Bill will have human rights implications. Based on feedback from the Human Rights Commission and other stakeholders to an earlier Crimes (Invasions of Privacy) Amendment Bill 2017, the approach taken in this Bill has been refined over the course of two previous consultations.

As a priority, this Bill intends to address parts of the ACT law where the following rights are lacking or where improvements could be made:

- Protection of the family and children (section 11) - “every child has the right to the protection needed by the child because of being a child, without distinction or discrimination of any kind”.
  - This Bill seeks to provide greater protection to young people than under existing legislation. The reforms to the child sex and pornography offences will ensure that young people are not unfairly prosecuted for consensual activity.

Pursuant to section 28 of the *Human Rights Act 2004*, this Bill engages and places limitations on the following rights:

- Rights in Criminal Proceedings (section 22)
  - There was concern raised by the Human Rights Commission in a previous consultation that the particular construction of the new definition of “consent” would have placed the burden of proof on the defendant to prove they received consent from the other party and would thus be incompatible with the right to be presumed innocent. A number of submissions wrote in support of placing the burden of proof on the defendant, but it was recognised there was a construction that could be adopted that would, on balance, satisfy this right while also bringing about the policy intent of this Bill. The definition of consent was revised accordingly and this Bill reflects the amended definition.
  - Engaging with the limitations framework at section 28(2) of the *Human Rights Act 2004*, human rights are impacted in these ways:

*a) the nature of the right affected*

Section 22(1) of the *Human Rights Act 2004* reads “everyone charged with a criminal offence has the right to be presumed innocent until proven guilty according to the law”. Further, section 22(2)(a) reads “anyone charged with a criminal offence is entitled to the following minimum guarantees, equally with everyone else - to be told promptly and in detail, in a language that he or she understands, about the nature and reason for the charge”.

Rights in criminal proceedings are not considered non-derogable and are capable of being subject to reasonable limitations, demonstrably justified in a free and democratic society, pursuant to section 28 of the *Human Rights Act 2004*.

*b) the importance of the purpose of the limitation*

Section 67(1)(b) of the Bill engages with the right to be presumed innocent. The new definition of consent varies the fault element of the offences it engages with, to the extent that it may impact or change the evidential burden upon the accused.

This limitation upon this right is to prevent a greater injustice of allowing the continuation of “implied consent” in sexual offences - where, merely because one of the negating factors was not engaged or that the accused was in effect reckless about seeking it. In fact, in the ACT, the common law defence to “honest belief” in receiving consent does not need to be reasonable.

c) *the nature and extent of the limitation*

By adopting an affirmative, communicative model for consent, and, in establishing consent, needing to prove that the accused either knows or reasonably believes that the consent was given, the nature of the burden of proof may change. In practical terms, knowledge of or reasonable belief of consent is not a provable fact, and its existence is ensconced entirely in the mind of the accused. How a prosecution might prove this is difficult to determine without close interrogation of evidence law in the ACT, and therefore, the extent of limitation is difficult to ascertain at this stage.

d) *the relationship between the limitation and its purpose*

The objective of the legislation is to institute an affirmative, communicative model of consent, and the construction adopted by this Bill is the least restrictive upon the rights of the accused while achieving that purpose.

e) *any less restrictive means reasonably available to achieve the purpose the limitation seeks to achieve*

The overriding objective of this Bill is to introduce a stronger, affirmative, conversational model of consent in the ACT. This change is in line with community expectations and follows considerable public discussion on the nature of sex, consent and criminality in our community after the #MeToo Movement rose to prominence over the past two years.

Other jurisdictions approach fault in consent either through recklessness provisions or common law defences to belief (as is the status quo in the ACT). This model perpetuates the idea that non-consent needs to be expressed - either through physical resistance or verbal instruction -, and ignores the reality that many victims of sexual violence feel unsafe or unable to resist in such ways.

As a result, there is no less restrictive means to effectively achieve this Bill's overriding objective than the model proposed therein.

The substantive improvements to human rights this Bill affords, combined with the mitigation of the limitations on sections 22 detailed above, should ensure that this Bill is compliant with section 28 of the *Human Rights Act 2004* (ACT).

## **Consultation Process**

The exposure draft of the Crimes (Consent) Amendment Bill 2018 was listed on the ACT Legislation Register on Monday, 19 February 2018, along with the original explanatory statement and the consultation arrangements.

Simultaneously, the accompanying Discussion Paper went online at:

<https://www.scribd.com/document/371619585/ACT-GreensDiscussion-Paper-on-Consent-in-Sexual-Violence-Laws>

The consultation period was between 19 February 2018 and 23 March 2018.

The exposure draft, and supporting materials, of the Crimes (Consent) Amendment Bill 2018 was presented to the Assembly on Wednesday, 21 February 2018.

As part of the consultation process, an email was sent to 69 stakeholders inviting them to contribute and drawing their attention to the Discussion Paper, Exposure Draft of the Bill and the accompanying Explanatory Statement. The stakeholders contacted were across all relevant sectors - legal academics and peak bodies, community services, and privacy and domestic violence reform advocates. A list of stakeholders contacted is available on request.

Submissions closed formally on Friday, 23 March 2018, however an extension was granted until Wednesday 28 March 2018 to allow more time as requested by several stakeholders.

A number of stakeholders provided feedback that their views on consent are unchanged from the earlier consultation on the Crimes (Invasions of Privacy) Amendment Bill 2017. A comprehensive report on how consent is addressed in the 17 submissions to that Bill are available here:

[http://www.legislation.act.gov.au/es/db\\_56609/current/pdf/db\\_56609.pdf](http://www.legislation.act.gov.au/es/db_56609/current/pdf/db_56609.pdf)

## ***Submissions Received***

The consultation process returned 9 written submissions.

We thank the following for their submissions and for their time, effort and contribution to the final draft of this Bill:

1. Professor Patricia Easteal
2. ACT Council of Social Services, in consultation with:
  - a. Women's Centre for Health Matters;
  - b. Youth Coalition of the ACT;
  - c. Sexual Health and Family Planning ACT;
  - d. the ANU Women's Department; and,
  - e. Legal Aid ACT
3. Women's Centre for Health Matters
4. ACT LGBTIQ Ministerial Advisory Council
5. Women With Disabilities ACT

6. Youth Coalition of the ACT
7. ACT Human Rights Commission and co-signed by:
  - a. the Human Rights Commissioner;
  - b. the Victims of Crime Commissioner ;
  - c. the Public Advocate and Children & Young People Commissioner; and,
  - d. the Discrimination, Health Services, Disability & Community Services Commissioner.
8. YWCA Canberra
9. Georgia O’Dea

Copies of the written submissions are available by request to the office of Caroline Le Couteur MLA at [LECOUTEUR@parliament.act.gov.au](mailto:LECOUTEUR@parliament.act.gov.au).

### ***Key Issues Arising from Consultation***

All submissions noted the need to define consent in the Crimes Act of the ACT and all submissions supported the proposed changes to the current legislation to incorporate an affirmative definition of consent based on free and voluntary agreement. All submissions were equally supportive of the need to extend the “2 year rule” to apply to the amended legislation.

Submissions 2, 3, 4, 5, 6, 7, 8 and 9 also strongly referenced the need to provide a comprehensive community-wide education campaigns to ensure young people, in particular, were aware of the changes enacted by this legislation and what they mean. Specifically, submission 7 states;

*“...it will be important to ensure that these reforms are accompanied by education initiatives about what is and is not acceptable behaviour, and that a person should take steps to ensure the other person is consenting of that behaviour.”*

In addition, submissions 2, 3, 4, 5, 6, 7, 8 and 9 asked for specific examples of how the proposed definition of consent would apply. It is more appropriate to address the need for specific examples through targeted community education initiatives, and an effective implementation plan for this Bill would require dedicated funding for education.

Submission 1 highlights the importance of the gendered nature of sexual violence and the problematic mainstream understanding of and difficulties in prosecuting Intimate Partner Sexual Violence, in spite of its high prevalence, including the inherent inequalities of the criminal justice system.

Submission number 5 referenced the importance of viewing these changes through a disability lens, as well as the sociological, criminological and gendered lens already present. This issue will need to be specifically addressed through targeted education initiatives. Also, noting the particular reference to the high incidence, yet low reporting, of sexual assault on women with disabilities and of image-based abuse of people with disability compared to non-disabled people.



Submissions 2 and 6 asked that the ACT Government advocate for the Commonwealth to change legislation to bring the civil penalties regime for intimate image abuse into line with the States and Territories, with specific reference to the “2 year rule” for young people aged 16-18 years.

Submission 4 raises two key issues for future reform - clarifying informed consent in the context of medical decisions, and the potential for existing section 67(f) to be used to discriminate and criminalise trans- and gender-diverse individuals. Both of these reforms should be considered seriously, however are outside the scope of this Bill.

Submission 6 identifies the need to include, in the judgement of cases which concern the consensual distribution/possession of intimate imagery and young people, an independent third-party mediator such as the Public Advocate or the ACT Children and Young People’s Commissioner. This would ideally be addressed in the implementation plan for this Bill.

Submission 7 is concerned that this Bill’s construction of consent is a departure from other jurisdictions consent clauses as it includes the “reasonable belief” requirements as part of the definition. This advice has been noted. The construction in this Bill was adopted based on the overriding objective to have a clear definition of consent that is capable of being communicated to and understood by members of the wider ACT community. The other constructions raised by the submission obfuscate the “reasonable belief” provision, which might be more acceptable to the legal community, nonetheless leaves the common understanding of consent out of step with the legislation - something this Bill seeks to address.

The further concerns raised regarding that the offences in section 66 be treated in the same way as sections 64 and 65 in the Act have been addressed in light of recent changes to this section in consultation with the Attorney-General.

# CRIMES (CONSENT) AMENDMENT BILL 2018

## DETAIL

### Clause 1 - Name of Act

This is a technical clause that names the short title of the Act. The name of the Act would be the *Crimes (Consent) Amendment Act 2018*.

### Clause 2 - Commencement

This clause provides that the Act commences the day after it is notified.

### Clause 3 - Legislation Amendment

This clause identifies the legislation amended by the Act.

### Clause 4 - Grooming and depraving young people - Section 66 (5)

This clause is a consequential amendment resulting from the extension of the “two-year rule” under clause 5 to section 66.

### Clause 5 - New section 66A

This clause inserts an exception to certain child sex offences to address concerns from family violence and human rights advocates relating to the risk of young people who consent to the sharing of sexual material between each other but are nonetheless under the age of majority being prosecuted under child pornography offences, being (per subsection (1)):

- section 64(1) (Using child for production of child exploitation material etc)
- section 65(1) (Possessing child exploitation material)
- section 66 (1) (Grooming and depraving young people)

“Child exploitation material” is defined as “anything that represents (a) the sexual parts of a child; or (b) a child engaged in an activity of a sexual nature; or (c) someone else engaged in an activity of a sexual nature in the presence of a child; substantially for the sexual arousal or sexual gratification of someone other than the child”.

On a plain English reading of this clause, the definition of “child exploitation material” could include intimate images consensually shared between two young people, who, for example, may be in a sexually-active relationship. This change seeks to ensure that young people consensually engaging in this behaviour are not at risk of prosecution.

Likewise, while section 66 addresses inadvertent criminalisation of young people undertaking consensual sexual activities - particularly relevant to this section being the sexual script and “sexting” behaviours - through the “without reasonable excuse” clause at section 66(1)(a), the section does not directly address the issue of consensual activity

among young people. For consistency and to ensure the maximum clarity, the “two-year rule” was extended to section 66.

The exclusion operates in a similar manner to the “similarity of age” defence at clause 5.2.17 of the *Model Criminal Code*. The Australian Law Reform Commission investigated these similarity in age provisions at length in part 25 of the ALRC Report.

*5.2.17 Defence—similarity of age*

- 1) *A person is not criminally responsible for an offence against this Division in respect of an act if, at the time of the act, the child concerned was over the age of [no defence age] and:*
  - a) *the person was not more than 2 years older than the child, and*
  - b) *the person was not more than 2 years younger than the child.*
- 2) *An offence of incitement under Part 2.4 is committed by a person who urges another person to engage in an act of sexual penetration or indecent touching or an indecent act even if the other person does not commit an offence by doing so because of subsection (1).*

Recent research from the Queensland Sentencing Advisory Council suggests that nearly half of all those prosecuted for child pornography offences are under the age of 17. The exact breakdown of those caught nor the proportion that were causing real harm with exploitative material is not known.

Feedback from the ACT Government indicates that it is not aware of any prosecutions under comparable offences in the ACT that have been against consenting young people. A number of human rights and justice advocacy groups have raised concerns that the status quo is too reliant on the discretion of Government executives and on making subjective moral decisions, over a coherent legal construction that prevents the prosecutions ever happening. This exclusion addresses this issue before it becomes a problem in the ACT.

This clause protects young people engaging in consensual behaviour and/or sharing consensually-produced and consensually-shared images. It is important that our criminal law focuses on wrongdoing and the potential for harm rather than on what consenting young people do regardless of their age.

Existing sections 68 “Sexual intercourse—people not to be presumed incapable by reason of age” and 72D(2) protect young people engaging in consensual sex and consensual distribution of intimate images of another young person.

**Clause 6 - Section 67 heading**

This clause changes the heading for section 67 from “Consent” to “Meaning of consent—sexual offence consent provisions”.

**Clause 7 - Consent - Section 67(1)**

This clause inserts a definition of consent with respect to sexual offences.

The current section 67(1) defines consent only by what would negate consent (for example, intoxication or the threat of violence), rather than defining consent by what it is and then listing negating factors.

### ***Subsection 67(1) - Definition of Consent***

This clause would define consent by these elements:

*For a sexual offence consent provision, consent of a person to an act mentioned in the provisions by another person is—*

- (a) the person gives free and voluntary agreement; and*
- (b) the other person—*
  - (i) knows the agreement was freely and voluntary; or*
  - (ii) is satisfied on reasonable grounds that the agreement was freely and voluntarily given.*

This definition would help protect victims of sexual offences by ensuring that the communicative aspect of consent is relevant to a prosecution, and removing the possibility that consent can be “assumed”.

### ***Subsection 67(1A) - Factors that Negate Consent***

This clause is a consequential amendment to rectify numbering due to these new provisions.

### **Clause 8 - Section 67 (2) and (3)**

This clause is a consequential amendment to rectify numbering due to these new provisions.

### ***Subsection 67(4)***

This clause inserts a definition of “sexual offence provision” to enumerate which offences clause 7 subclause (1) affects, being:

- section 54 (sexual intercourse without consent);
- section 54(3)(b) (reasonable belief defence to sexual intercourse with a young person between the ages of 10 and 16);
- section 60 (act of indecency without consent);
- section 61(3)(b) (reasonable belief defence to acts of indecency with young people between the ages of 10 and 16);
- section 66A(2)(c) (exceptions to offences for consenting young people).

The previous section 67(1) enumerated those offences by an in-text list being “For sections 54, 55 (3) (b), 60 and 61 (3) (b)”. This drafting was not aligned with plain English drafting principles.

This clause creates a clear list of offences to which the definition of consent applies.

**Clause 9 - Consent---part 3A - New section 72F (1)**

Sections 72F(1A) replicates the definition of consent from sections 67(1) and 67(1A) for “distribution of an intimate image”.

**Clause 10 - Section 72(F) (1)**

This clause is an amendment to convert a phrase to plain English.

**Clause 11 - Dictionary, new definitions**

This clause inserts references to the new definitions created by this Bill.